United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7249
-7237

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY et al.,

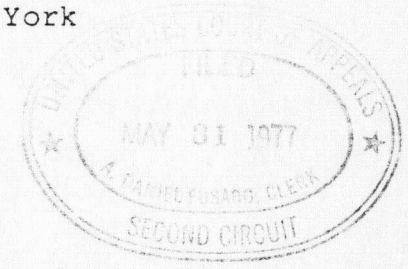
Defendants-Appellants.

TOWN OF HEMPSTEAD, et al.

Applicants for Intervention-
Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF PLAINTIFFS-APPELLEES,
BRITISH AIRWAYS BOARD AND
COMPAGNIE NATIONALE AIR FRANCE



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No. 77-~~7249~~ 7237

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BRIEF OF PLAINTIFFS-APPELLEES, BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE

ISSUE PRESENTED

Whether the District Court properly denied the second or renewed motion to intervene of Applicants, Town of Hempstead, et al.

STATEMENT OF THE CASE

This appeal arises in connection with a companion case bearing the same caption (No. 77-7237). On May 20, 1977, at the conclusion of a hearing scheduled to settle the

judgment in the companion case, Applicants moved orally to renew an earlier motion to intervene (JA 88a).* No papers in support of the renewed motion had been served or filed and, indeed, there had been no notice that the motion would be presented. The District Court for the South District of New York (Milton Pollack, D.J.) denied the motion on the record (Id.) and by an endorsement on the motion papers later filed (omitted from Appendix; see, JA 67aa).

ARGUMENT

The District Court properly denied Applicants' motion for the following reasons:

1. Applicants' motion below merely repeated--indeed incorporated by reference (Applicants' Br. below, p. 2) -- the points raised in support of the earlier motion to intervene, which the District Court had denied. That earlier denial was affirmed by this Court at a hearing on November 8, 1976. (No. 76-7339). The issue was thus finally determined against Applicants.

No circumstances have changed and no new arguments have been raised. In an apparent attempt to raise such an issue, Applicants point to a "concession" of the Port Authority's counsel as to the scope of the legal issues presented (Transcript of Argument, April 28, 1977, p. 92):

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* "JA" refers to the Joint Appendix herein.

"THE COURT: ...Are you in agreement with Mr. Wells or perhaps with Mr. Nickles that the Court is not asked to decide whether the noise level of the Concorde is tolerable or not acceptable, nor whether the aircraft should be given a chance to prove itself?

MR. FALVEY: Not at this time, your Honor.

THE COURT: Those are matters solely for the governmental agency, isn't that correct?

MR. FALVEY: That is correct."

But, the so called "concession" raised no new issue. As the District Court stated in its opinion denying Applicants' earlier motion to intervene (JA 36-37):

"While there may be an adversity of interests between the Port Authority and the proposed intervenors in some contexts, it is simply speculation to suppose that any such divergence in viewpoint is applicable on the facts of this case. The instant lawsuit will not resolve the merits of the supersonic aircraft, but simply the power and authority of a local airport to deny entry to a plane whose flights have been specifically approved by the federal government." (Emphasis supplied).

Precisely the same issue here sought to be raised -- that is, the adequacy of representation on this particular point -- was briefed and argued on the earlier appeal. Applicants present no new facts which would justify a the granting of the renewed of the motion.

2. In any event, Applicants' renewed motion was

not timely. The facts upon which the motion to intervene was renewed occurred on April 28, 1977. The motion to intervene was not made then nor was it made before the Court rendered its decision on May 11, 1977. It was, instead, made only after the Court had held a hearing on the form of Judgment on May 20, 1977, and after the Court had actually directed the entry of judgment (JA 87a-88a). Rule 24(a) F.R. Civ. P. See, Hobson v. Hansen, 44 F.R.D. 18, 22 (D.C.D.C. 1968). And even, then the Applicants altogether disregarded the appropriate procedures for presenting their motion.

CONCLUSION

For the reasons assigned, the order below, denying Applicants' motion to intervene, should be summarily affirmed.

Respectfully submitted,

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Plaintiffs-Appellees

v.

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TOWN OF HEMPSTEAD, et al.,

Applicants for Intervention-Appellants.

No. 77-~~7249~~ -7237

ATTORNEY'S AFFIRMATION OF PERSONAL SERVICE

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned, an attorney at law of the State of New York and a member of the Bar of this Court, affirms:

1. I am associated with Rogers & Wells, attorneys of record for plaintiff-appellee, Compagnie Nationale Air France;

2. On May 31, 1977, at 9:30 A.M., I served the annexed BRIEF FOR PLAINTIFFS-APPELLEES, BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE, on Patrick J. Falvey, Esq., attorney for defendants-appellants, at his office, ~~Room 67E~~ 9th Flr., One World Trade Center, New York, New York, and on William D. Denson, Esq., attorney for Applicants for Intervention-Appellants, at his office, 551 Fifth Avenue, New York, New York, by leaving two true copies thereof with their clerks or other persons in charge;

3. I affirm the foregoing statements to be true under the penalties of perjury.

Dated: New York, New York
May 31, 1977

Stephen Froling
200 Park Avenue
New York, New York 10017